84-764

NO.

Office-Supreme Court, U.S
FILED
OCT 27 1984
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

IN RE:
NEW ORLEANS PUBLIC SERVICE, INC.,

PETITIONER

PETITION FOR WRITS OF MANDAMUS AND CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION BY NEW ORLEANS PUBLIC SERVICE, INC.

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QUESTIONS PRESENTED FOR REVIEW

Question I

Where federal question jurisdiction exists and there is a valid order stating that federal jurisdiction exists and there is no issue concerning the propriety of removal, is an order of remand, issued without reasons, invalid and reviewable by writ of mandamus?

Question II

Is 28 U.S.C. §1447(d) unconstitutional in cases involving federal question jurisdiction removed under 28 U.S.C. 1441(b) where its application results in denial of a federal forum and precludes review of an order of remand?

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* The Petition For Writs to the Fifth Circuit has not been included as it is lengthy and substantively addresses the same issues as the petition herein.

TABLE OF AUTHORITIES

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

IN RE NEW ORLEANS PUBLIC SERVICE, INC.,

PETITIONER

PETITION FOR WRITS OF MANDAMUS
AND CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION OF
NEW ORLEANS PUBLIC SERVICE, INC.

Petitioner, New Orleans Public Service, Inc., (hereinafter called NOPSI) a corporation organized under the laws of the State of Louisiana, petitions the Court for issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit requiring that Court to vacate and reverse its order denying Petitioner's petition for writs of mandamus and certiorari thereby refusing to vacate the order of the United States District Court for the Eastern District of Louisiana, Honorable Martin L. E. Feldman, remanding this removed case to the Louisiana state court system. NOPSI requests the issuance of a writ of mandamus requiring the lower federal courts to reassume jurisdiction over this matter.

REPORTS, OPINIONS AND JUDGMENTS OF COURTS BELOW

This case commenced with the plaintiff's filing of a

suit styled "Warren C. Majoue, Jr. versus New Orleans Public Service, Inc.", Docket No. 82-18080 in the Civil District Court for the Parish of Orleans on November 19, 1982.

NOPSI responded by filing a petition for removal in the United States District Court for the Eastern District of Louisiana.

By order of a Magistrate dated April 3, 1984 jurisdiction and venue were deemed established.[1] NOPSI moved for Summary Judgment on July 30, 1984. Plaintiff filed a motion to remand and a motion for leave to file a supplemental and amending complaint. By order dated August 29, 1984 plaintiff's motion to remand was granted and NOPSI's motion for summary judgment was determined to be moot.[2]

NOPSI applied for Writs of Mandamus and Certiorari to the United States Court of Appeals for the Fifth Circuit in September 1984 seeking reversal of the district court's remand order. By order dated September 28, 1984 the petition for Writ of Mandamus was denied.[3] No mention was made of the petition for writ of certiorari in that order.

There have been no reasons for judgment or opinions issued in conjunction with the above orders and there are no reported decisions.

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[1] Appendix "A"

[2] Exhibit 1

[3] Appendix "B"

GROUNDS FOR INVOCATION OF JURISDICTION

A) The United States Court of Appeals for the Fifth Circuit denied NOPSI's Application for Writs of Mandamus and Certiorari on September 28, 1984. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254 (1) to review that judgment.

B) Jurisdiction of this Court to review that denial is conferred by 28 U.S.C. § 1651 as Petitioner requests the issuance of Writs of Mandamus and Certiorari to review the action of the Court of Appeals in refusing to vacate the district court's remand of this case to the Louisiana state courts. Because of 28 U.S.C. § 1447(d) the relief requested herein is not otherwise available.

INVOLVED PROVISIONS OF LAW

1) 28 U.S.C. §1447(c)(d).

> (c) ...If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction the district court shall remand the case...
>
> (d) An order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the state court from which it was removed pursuant to Section 1443 of this title shall be reviewable by appeal or otherwise.

2) 28 U.S.C. §1441(b).

> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or

laws of the United States shall be removable without regard to the citizenship or residence of the parties...

3) 29 U.S.C. 1132(e)(1)

§1132 Civil Enforcement

(e) Jurisdiction.

(1) Except for actions under subsection (a)(1)(b) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter...State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(b) of this section.

4) 29 U.S.C. 185(a)

§185 Suits By and Against Labor Organizations

(a) Venue, amount and citizenship.

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

5) U.S. Constitution, Article III, Section 2.

The judicial power shall extend to all cases in Law and Equity arising under this Constitution, the Laws of the United States...

6) U.S. Constitution, Article VI, Clause 2.

> ...This Constitution, and the Laws of the United States which shall be made in Pursuance thereof;...shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby...

7) U.S. Constitution, First Amendment.

> Congress shall make no law...abridging...the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

8) U.S. Constitution, Fifth Amendment.

> No person shall...be deprived of life, liberty or property. without due process of law;

STATEMENT OF THE CASE

This action was commenced on November 19, 1982, by plaintiff, Warren C. Majoue, Jr., (hereinafter called plaintiff) a former employee of NOPSI in the Civil District Court for the Parish of Orleans. In his state court petition,[4] plaintiff alleged that NOPSI had breached its employment agreement[5] with plaintiff by discharging him four years short of his attaining eligibility for disability retirement benefits.[6] As a consequence of this alleged breach, plaintiff

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[4] Appendix "C"

[5] This employment agreement was predicated upon alleged oral promises made to plaintiff both at the time of his hiring and following an injury in 1975 as well as NOPSI's alleged custom and practice.

[6] Petition paragraph XI.

allegedly lost wages, disability benefits, retirement benefits, insurance benefits and suffered emotional distress all aggregating $800,000.00.[7]

NOPSI removed the action to federal court pursuant to 28 U.S.C. §1441(b) claiming that it was an action founded on a claim or right arising under the laws of the United States, specifically 28 U.S.C. §1331, 29 U.S.C. §185, §1132 and §1140. NOPSI claimed that plaintiff's state court petition disclosed on its face that it was in reality a suit for pension benefits arising under the Employee Retirement Income Security Act, 29 U.S.C. §1001, *et seq* (hereinafter called ERISA) which vests jurisdiction over said issues in the federal courts. 29 U.S.C. §1132(e). NOPSI also claimed that plaintiff's state court petition disclosed, in paragraphs XI and XII, a cause of action under 29 U.S.C. §1140. Finally, NOPSI asserted that plaintiff's state court breach of contract claim failed to disclose that it was in reality a cause of action for breach of a collective bargaining agreement, a federal cause of action arising under the Labor Management Relations Act, 29 U.S.C. §185(a) (hereinafter called LMRA).

Following removal of the case issue was joined and discovery ensued. The parties completed approximately fifteen depositions, produced numerous documents, confected a pre-trial order and prepared for a trial set to commence on September 10, 1984. In a Preliminary Pre-Trial conference held with Magistrate Wynne on April 3, 1984, the Magistrate inquired about jurisdiction and counsel for plaintiff agreed that "concurrent jurisdiction" existed. On April 5, 1984, Magistrate Wynne issued her minute entry stating "Jurisdiction and Venue are established".

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[7] Petition paragraph XII.

Nearly two years after removal of this action, after lengthy discovery and on the eve of the trial, plaintiff requested that the matter be remanded to state court. In opposition to the motion to remand, NOPSI contended that the plaintiff's state court petition disclosed that it "arises under" the laws of the United States and was properly removed to this court. Alternatively, NOPSI contended that plaintiff had waived any right to object to removal by having participated in lengthy discovery and other proceedings in the trial court.

Following oral argument the Honorable Martin L. E. Feldman, by minute entry dated August 29, 1984, remanded this matter to state court. Judge Feldman gave no reasons for remand in the minute entry. Judge Feldman has at no time vacated the finding of jurisdiction made by Magistrate Wynne.

NOPSI then filed a Petition for Writs of Mandamus and Certiorari to the United States Court of Appeals for the Fifth Circuit. On Spetember 28, 1984 the Fifth Circuit entered Judgment denying the Petition for Writ of Mandamus, without reasons. No mention was made of NOPSI's alternative request for a writ of certiorari.

REASONS FOR GRANT OF WRITS

The Court should grant NOPSI's petition herein because the decision of the District Court and Court of Appeals has deprived NOPSI of a federal forum in a case involving federal labor and pension policy thereby thwarting important federal interests. The jurisdiction of the federal courts has been denied by remand of this matter to state court and such action will destroy uniform development of federal common law in the important areas of labor and pension policy embodied in ERISA and the LMRA.

The entire question of federal jurisdiction and the preemptive scope of ERISA is a matter over which the federal courts differ and guidance from this court will help settle this important area of federal concern.

ARGUMENT

QUESTION I

WHERE FEDERAL QUESTION JURISDICTION EXISTS AND WHERE THERE IS A VALID ORDER STATING THAT JURISDICTION EXISTS AND THERE IS NO ISSUE CONCERNING THE PROPRIETY OF REMOVAL, AN ORDER OF REMAND, ISSUED WITHOUT REASONS, IS INVALID AND SUBJECT TO REVIEW BY WRIT OF MANDAMUS.

I. REMAND WAS IMPROPER UNDER 28 U.S.C. §1447(c).

NOPSI is uncertain as to the reason for the remand order. However it is beyond dispute that the case was not remanded for the reasons set forth in 28 U.S.C. §1447(c) which provides: "...If at any time before final judgment it appears that the case was *removed improvidently and without jurisdiction* the district court shall remand the case..." There has never been any question here that the mechanics of removal were properly handled. As to jurisdiction, there remains a valid Magistrate's finding of jurisdiction. The Court assigned no written reasons for remand.[8]

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[8] The court orally expressed concern, *inter alia*, about a remand of the ERISA §510 claim and how the state court could have jurisdiction on remand over a claim it didn't have jurisdiction over to begin with due

This Court has ruled that in addition to the express exception for civil rights actions provided for by 28 U.S.C. §1447(d), there exists a narrowly defined exception to the rule of non-appealability of remand orders, when the order of remand has affirmatively stated grounds for remand other than those provided for by 28 U.S.C. §1447(c). *Thermtron Products, Inc. v. Hermansdorfer,* 423 U.S. 336, 46 L.Ed.2d 542 (1976). In *Gravitt v. Southwestern Bell Tel. Co.,* 430 U.S. 723, 52 L.Ed.2d 1 (1977), this Court declined to extend that exception to situations where an order stated §1447(c) reasons for remand by implication.

This case presents a unique set of facts, clearly warranting issuance of a writ of mandamus. In *Gravitt,* the order made an unsupported statement that the action had been "improperly removed". In NOPSI's case, there is a valid minute entry which affirmatively states that federal jurisdiction was established. In the remand order, there is no statement whatsoever concerning the grounds for remand. There is also no statement vacating the minute entry that jurisdiction was established. There has never been an issue in this case concerning the propriety of the removal. Therefore, if removal was timely, if jurisdiction was established and yet the cause was remanded, NOPSI asserts that the remand could not have been pursuant to 28 U.S.C. §1447(c) and therefore the remand was improper. In these circumstances

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(Footnote 8 continued)
to 28 U.S.C. §1132(e)(1). While much of the court's comments consisted of colloquy with counsel, as opposed to explicating a basis for remand, the Court seemed to believe that the concurrent jurisdiction provision of ERISA, 29 U.S.C. §1132(e)(1) afforded a basis for remand. This is clearly in error as even an ERISA claim over which a state court has concurrent jurisdiction is properly removable. *McConnell v. Marine Engineers Beneficial Assn.,* 526 F.Supp. 770 (U.S.D.C., N.D. Cal. 1981).

a writ of mandamus should issue to reverse the improper denial to NOPSI of a federal forum.

II. JURISDICTION WAS ESTABLISHED IN FEDERAL COURT MAKING REMAND IMPROPER UNDER 28 U.S.C. §1447(c)

A. THIS CASE WAS PROPERLY REMOVED TO FEDERAL COURT PURSUANT TO 28 U.S.C. §1441(b), BECAUSE THE COMPLAINT (PETITION) DISCLOSED ON ITS FACE, A FEDERAL CAUSE OF ACTION UNDER 29 U.S.C. §1001 *ET SEQ.*

NOPSI is aware that the Court's focus on this Petition is not usually so expansive as to include the propriety of the court's remand order as if on appeal because to do so would defeat 28 U.S.C. §1447(d). However, since the order is deficient on its face and the record contains a contradictory finding of jurisdiction, the Court must consider the underlying issues concerning the propriety of removal in the first instance. This is especially true in a case involving the federal labor-pension policy.

Plaintiff's allegations that NOPSI breached an agreement to employ him until he became eligible for disability retirement are grounded upon a breach of contract theory under Louisiana law. However, it is well-established that such breach of contract claims relating to both employment and pension are superceded by ERISA.

NOPSI's disability retirement plan which is the central focus of plaintiff's action is governed by ERISA because it is an "employee pension benefit plan" as defined in the Act, 29 U.S.C. §1002(2)(A). Any state law cause of action relating to the disability plan is, therefore, superseded

under the equivocal language of Section 514 of ERISA, 29 U.S.C. §1441, which provides in part:

> (a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.
>
> * * * * *
>
> (c) For purposes of this section:
> (1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

In enacting this section, Congress expressly indicated that it intended to occupy the field of employee benefit and pension plans. ERISA's sweeping language superseded all state laws which "relate to" employee pension plans, not only state laws which attempt to directly regulate areas expressly covered by ERISA. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981); *Hayden v. Texas-U.S. Chemical Co.*, 681 F.2d 1053 (5th Cir. 1982); *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir. 1981), *cert. denied*, 454 U.S. 968 (1981).

Recently, this Court has emphasized that ERISA's "scope was as broad as its language." *Shaw v. Delta Airlines*, __ U.S. __, 77 L.Ed.2d 490 (1983). The benefits which plaintiff seeks here are provided by an ERISA pension plan. The state law protection of contract rights

clearly "relates to" an ERISA plan when the contract which has been allegedly breached concerns an ERISA plan. ERISA mandated that the courts create a federal common law regarding pension entitlement *Woodfork v. Marine Cooks & Stewards Comm.*, 642 F.2d 966, 972-3 (5th Cir. 1981). Accordingly, these state contract claims fall squarely within the category of state laws explicitly superseded by ERISA.

ERISA clearly provides a remedy for the alleged breach of contract which plaintiff's state law claims embrace. In 29 U.S.C. §1140, ERISA states that:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. .. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

In addressing claims similar to that presented herein the federal courts have concluded that Section 1140 of ERISA covers any state law claim for breach of contract or wrongful discharge relating to employee benefit or pension plans. For example, in *Dependahl, supra,* the Eighth Circuit concluded that Section 1140 of ERISA covered a state law claim for tortious interference with an employee pension plan. *Accord, Kelly v. IBM,* 573 F.Supp. 366 (E.D. Pa. 1983) (wrongful discharge claims); *Ovitz v. Jefferies & Co.,*

Inc., 574 F.Supp. 488 (N.D. Ill. 1983) (breach of contract claim); *Tolson v. Retirement Committee*, 566 F.Supp. 1503 (E.D. Wis. 1983) (breach of contract claim); *Shaw v. International Ass'n. of Machinists*, 563 F.Supp. 653 (C.D. Cal. 1983); *Maxfield v. Central States Welfare and Pension Funds*, 559 F.Supp. 158 (N.D. Ill. 1982) (wrongful discharge claim).

In determining the propriety of removal, it is well settled that a federal court should evaluate the substantive underpinnings of plaintiff's claim. *Villarreal v. Brown Express, Inc.*, 529 F.2d 1219, 1221 (5th Cir. 1976), *See*, 14 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, §3721, at 530 (1976). Although plaintiff is generally considered master of his complaint, the accepted rule is that upon removal the court should inspect the entire record to determine whether a federal claim is presented, even if the plaintiff has styled his pleading exclusively in terms of state law. *Eitmann v. New Orleans Public Service, Inc.*, 730 F.2d 359 (5th Cir. 1984) (*appl. for cert. pending*). "[T]he reviewing court looks to the substance of the complaint, not the labels used in it." *In re Carter*, 618 F.2d 1093, 1101 (5th Cir. 1980), *cert. denied*, 450 U.S. 949 (1981). Judicial consideration of the removal petition is particularly appropriate in matters, such as Section 301 and ERISA actions, where state law is preempted. As the Sixth Circuit has explained, "[t]he force of Federal preemption in this area of labor law cannot be avoided by failing to mention Section 301 [of the LMRA] in the complaint." *Avco Corp. v. Aero Lodge, No. 735*, 376 F.2d 337, 340 (6th Cir. 1967), *aff'd*, 390 U.S. 557 (1968).[9] Accordingly, a Court must

[9] The Supreme Court has acknowledged the importance of removal in achieving a uniform national labor policy. In *Avco Corp.*, the Court explained that "[R]emoval is but one aspect of the primacy of the federal judiciary in deciding questions of federal law." 390 U.S. at 560 (quoting *England v. Medical Examiners*, 375 U.S. 411, 415-16 (1964)).

review the record as a whole before deciding whether federal removal jurisdiction exists in the instant proceeding. In resolving this matter the Court must look to the real nature of plaintiff's claim. Failure to do so would permit artful pleading to close off defendant's right to a federal forum; thereby defeating the Congressional policies underlying removal.

Powers v. South Central United Food & Commercial Workers Unions, etc., 719 F.2d 760 (5th Cir. 1983) is not to the contrary. *Powers* was action for damages for fraud and misrepresentation under Texas' Deceptive Trade Practices-Consumer Protection Act. In *Powers,* unlike here, the plaintiffs did not seek to recover plan benefits because it was undisputed that the plan did not cover the benefits at issue. In *Powers,* unlike here, the complaint did not disclose a federal cause of action but rather ERISA was only interjected into the suit as a defense. 719 F.2d 760, 767. Thus *Powers* is distinguishable because the complaint there disclosed no ERISA violations. ERISA's impact on the controversy in *Powers* was only disclosed by the reference to the defendant's defense of preemption but here it is disclosed on the face of plaintiff's state court petition "even though it is couched exclusively in terms of state law" *In re Carter,* 618 F.2d 1093, 1101; *Powers,* 719 F.2d 766 n. 6. It must be remembered that NOPSI here did not remove this case based upon preemption but rather because the plaintiff's state court petition alleged an ERISA cause of action. The removal petition here, filed before the *Powers* decision, makes no mention of preemption.

Eitmann v. New Orleans Public Service, Inc., supra, is instructive. The plaintiff in *Eitmann* made similar allegations to those made here and against the very same

defendant. The plaintiff in *Eitmann* mentioned no federal statute in his state court petition. NOPSI removed the case to U.S. District Court, for the Eastern District of Louisiana as stating a claim arising under Section 301 of the LMRA. 29 U.S.C. §185(a). On appeal, after having summary judgment rendered against him in the trial court plaintiff requested remand arguing that the case was improperly removed. The Court distinguished *Powers* and held that the federal court had original jurisdiction over the action despite the absence of a federal claim on the face of the complaint because "the court must be guided by the substance rather than the form of the complaint". 730 F.2d 359, 366. The Court continued, "Thus, because NOPSI's petition for removal clearly demonstrated that Eitmann's cause of action 'arose under' Section 301, the district court had original jurisdiction over the action" 730 F.2d 359, 367.

Accordingly, because the substance of the state court petition discloses ERISA causes of action the subject matter of this controverys "arises under" ERISA and was properly removed.[10] Alternatively, and in light of *Eitmann*, reference to the removal petition clearly demonstrates that plaintiff's cause of action arises under ERISA and raises the spectre of artful pleading to avoid federal jurisdiction.

Here, plaintiff's state court petition does not mention ERISA, but as we have seen, *In re Carter, supra*, that failure is not determinative. Plaintiff contends that he was improperly denied disability pension benefits and was terminated by defendant to keep him from attaining such

[10] ERISA also governs state law claims by mandatory creation of a federal common law regarding pension entitlement. *Woodfork v. Marine Cooks and Stewards Comm., supra* at 972-3.

benefits. Plaintiff contends that he was deprived of his right to maximize his normal retirement benefits. Plaintiff asks for relief in the form of payment of both disability and normal retirement benefits. These are all federal claims. The District Court and Court of Appeals have read ERISA too narrowly and have thereby frustrated Congressional policy. NOPSI has thereby lost a federal forum but a contrary decision would result in plaintiff's losing nothing. Plaintiff's state claims, if any, would remain under pendent jurisdiction.

B. THIS ACTION WAS PROPERLY REMOVED TO FEDERAL COURT UNDER SECTION 301 OF THE LMRA BECAUSE THE COLLECTIVE BARGAINING AGREEMENT ESTABLISHED AND GOVERNED PLAINTIFF'S COMPLETE TERMS AND CONDITIONS OF EMPLOYMENT.

Section 301 of the LMRA specifically applies to "[s]uits for violation of contracts between an employer and a labor organization...." 29 U.S.C. §185(a) (1976). As the Supreme Court has made clear, Congress' aim in enacting LMRA was to promote industrial peace through the collective bargaining process by ensuring the enforceability by the federal courts of such agreements. *Dowd Box Co. v. Courtney,* 368 U.S. 502 (1981). In *Dowd,* the Court observed:

> The Labor Management Relations Act of 1947 represented a far-reaching and many-faceted legislative effort to promote the achievement of industrial peace through encouragement and refinement of the collective bargaining process. It was recognized from the outset that such an effort would be purposeless unless both parties to a

> collective bargaining agreement could have reasonable assurance that the contract they had negotiated would be honored. Section 301(a) reflects congressional recognition of the vital importance of assuring the enforceability of such agreements.

368 U.S. at 509.

Federal jurisdiction was granted to provide for development of uniform federal law fashioned from a national labor policy. *See, Textile Workers Union v. Lincoln Mills,* 353 U.S. 448 (1957). Accordingly, the courts have continued to view Section 301 as a broad federal jurisdictional mandate. This interpretation is inconsistent with the Supreme Court's admonition that Section 301 is not to be read narrowly. *Smith v. Evening News Ass'n,* 371 U.S. 195, 200 (1962); *Textile Workers Union v. Lincoln Mills, supra* at 455 (1957). Following this reasoning, in *Wilkes Barre Publishing Co. v. Newspaper Guild,* 647 F.2d 372 (3rd Cir. 1981), *cert. denied,* 454 U.S. 1143 (1982), the Third Circuit Court of Appeals has observed:

> The issue [for determining Section 301 jurisdiction] is not the nature of the remedy sought for the alleged violation, but whether the remedy sought may require that the court from which it is sought, state or federal, to interpret a collective bargaining agreement. *Id.* at 380.

It is clear, therefore, that this broad reading of Section 301's jurisdictional mandate is to be applied with equal force in the context of removal. See *Eitmann v. New Orleans Public Service, Inc., supra.*

Plaintiff's state court petition can only be

characterized as artful pleading designed to avoid the federal basis of his claim in order to circumvent federal jurisdiction. Although plaintiff was a union member whose terms and conditions of employment were established and governed by a collective bargaining agreement at the time his alleged individual contract was made, his petition is devoid of any reference to these legally significant facts. Plaintiff has sought to avoid federal jurisdiction by alleging that he was wrongfully discharged in breach of an oral agreement under which he would be entitled to full salary until eligible for disability pension if he became incapable of performing his regular duties due to an occupational injury. Although plaintiff's petition is styled as an action based upon state law, this Court's inquiry may not stop at this point because "[i]t is the reality of the controversy, not the form of the pleadings, that determine whether the court has jurisdiction under Section 301." *Glaziers, Glass Workers v. Florida Glass & Mirror of Jacksonville,* 409 F.Supp. 225, 227 (M.D. Fla. 1976).[11]

Indeed, upon the filing of NOPSI's petition for removal the real nature of this controversy was brought within the jurisdictional ambit of Section 301. As the petition revealed, plaintiff's terms and conditions of

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[11] *Accord, Talbot v. National Supermarkets of Louisiana,* 372 F.Supp. 1050 (E.D. La. 1974); *Hayes v. C. Schmidt & Son, Inc.,* 374 F.Supp. 442 (E.D. Pa. 1974). *See also, Oquendo v. Dorado Beach Hotel Corp.,* 382 F.Supp. 516, 517 (D.P.R. 1974), where the court explained:

> Plaintiffs' characterization of their claims as based exclusively on local law, although entitled to judicial consideration, is nevertheless not determinative of defendant's right to removal since, "it is the real nature of the claim and not the characterization given it by plaintiffs which must govern the determination as to removability." *Id.* at 517 [quoting *Espino v. Volkswagen of Puerto Rico, Inc.,* 289 F.Supp. 979, 982 (D.P.R. 1968)].

employment, including fitness for work and conditions of dismissal, were established and governed by the collective bargaining agreement between NOPSI and a labor organization. For example, Section 7 of this agreement specifically provided that an employee may be discharged only for cause. Health and safety were explicitly covered by the collective bargaining agreement.

Plaintiff's petition, viewed in light of NOPSI's removal petition, demonstrates conclusively that each of his claims arise under the collective bargaining agreement. In dealing with similar instances of artful pleading, the courts have looked to the substantive underpinings of the complaint, rather than plaintiff's characterization, in concluding that federal removal jurisdiction was properly invoked. For example, in *Fristoe v. Reynolds Metal Co.*, 615 F.2d 1209, 1212 (9th Cir. 1980), the court explained:

> Although [plaintiff] had not mentioned LMRA §301 in the complaint, and stylized his causes of action in common law terms, the court questioned him carefully to determine the nature of his claims. It is apparent from the allegations in his complaint and his responses to the court's questions that Fristoe was alleging that Reynolds wrongfully discharged him in breach of the collective bargaining agreement and that the union improperly handled his grievance.
>
> Mere omission of reference to LMRA §301 in the complaint does not preclude federal subject matter jurisdiction. The court's recharacterization of Fristoe's complaint as one arising under §301 is required by federal preemption doctrines.
>
> When principles of federal labor law are involved, they supersede state contract law or other

state law theories. (citations omitted)

* * * *

Construing Fristoe's complaint to allege a breach of the collective bargaining agreement, we conclude that the district court had subject matter jurisdiction under LMRA §301. *Id.* at 1212.

C. REMOVAL JURISDICTION WAS PROPERLY INVOKED BECAUSE FEDERAL LABOR LAW PREEMPTS STATE CONTRACT LAW RELIED UPON BY PLAINTIFF.

It is well-settled that the "substantive law to apply in suits under §301(a) is federal law, which courts must fashion from the policy of our national labor laws". *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448, 456 (1957). Moreover, when principles of federal labor law under Section 301 are involved, they preempt state contract law or other state law theories. *Republic Steel Corp. v. Maddox,* 379 U.S. 650, 657 (1965); *Teamsters v. Lucas Flour Co.,* 369 U.S. 95, 102-03 (1962). The preemptive effect of federal law serves as a basis for federal removal jurisdiction, even if the plaintiff has styled his action as one grounded on state law alone. Preemption as the basis for federal removal jurisdiction is particularly appropriate in cases, such as the instant action, where the source of plaintiff's claim is the collective bargaining agreement.

It is well-settled that in matters relating to collective bargaining agreements, state law is preempted by federal labor law under Section 301. Since plaintiff's artfully pledged allegations were governed by a collective bargaining agreement, his breach of contract action is preempted by national labor policy. Accordingly, the preemptive force of federal labor law provided federal removal jurisdiction in

this action. *Eitmann v. New Orleans Public Service, Inc., supra.*

QUESTION II

28 U.S.C. §1447(c)(d) IS UNCONSTITUTIONAL AS APPLIED TO CASES INVOLVING FEDERAL QUESTION JURISDICTION PURSUANT TO 28 U.S.C. §1441(b).

I. THE IMPROPER REMAND OF THIS CASE WILL RESULT IN A VIOLATION OF ARTICLE III, SECTION 2 OF THE U.S. CONSTITUTION, AND THE 'SUPREMACY CLAUSE' OF ARTICLE VI CLAUSE 2.

Article III, Section 2 states in pertinent part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States..." Article VI Clause 2 states in pertinent part: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof;...shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby..."

As hereinbefore discussed, removal jurisdiction is a key component of the national labor and pension policy. In this important area of federal law and policy, the effect of the district court's ruling, erroneously remanding this case to state court, is to deny NOPSI its right to a federal forum in violation of the First Amendment and Article III, Section 2 of the U.S. Constitution. The trial judge's ruling is, under §1447(d) as applied, virtually unreviewable. Furthermore, a remand order is conclusive in the state court system because of the judicial doctrine of comity. *McLaughlin v. Hallowell,* 228 U.S. 278, 57 L.Ed 835 (1913).

Thus, the many district court judges, no matter how well intended, have the power to thwart the national labor and pension policy by virtue of this unreviewable power to remand cases arising under federal labor and pension legislation.

NOPSI is entitled to a federal forum for the many reasons hereinbefore discussed. Article III Section 2, of the United States Constitution guarantees NOPSI a federal forum in this case. The Supremacy Clause of the Constitution and valid federal laws enacted by Congress in pursuance thereof are one of the keystones of our federal system. *See, Graves v. Walton County Bd. of Education,* 300 F.Supp. 188 (USDC, M.D. Ga. 1968) affirmed 410 F.2d 1152 (5th Cir. 1969). There is no question that had plaintiff's state court petition originally been filed in federal court the court would have found subject matter jurisdiction: the complaint sought insurance benefits, disability benefits, retirement benefits and claimed plaintiff was discharged "just short" of qualifying for disability benefits. See 29 U.S.C. §§ 1132, 1140.

In federal court NOPSI, *inter alia,* would not have been faced with a jury trial, (*Calamia v. Spivey,* 632 F.,2d 1235 (5th Cir. 1980)), would have had its actions reviewed under an arbitrary and capricious standard (*Bayles v. Central States Southeast, etc.,* 602 F.2d 97, 99 (5th Cir. 1979)) and would have had various exhaustion of remedies defenses available to it (e.g. *Kross v. Western Electric Co.,* 701 F.2d 1238 (7th Cir. 1983)). Now, in state court, a jury will decide the case under any number of possible bases of liability. The jury will have to review the action of plan fiduciaries and interpret the plan. In effect, the jury will be given the right to write a new plan—one that says employees employed by NOPSI for sixteen, eight or five

years and who become disabled receive full pay while those who work twenty (20) years and are covered by NOPSI's disability plan receive a much smaller disability pension. These types of helter-skelter results are the opposite of the intended uniformity envisioned by ERISA.

The effect of a holding that 28 U.S.C. §1447(d) precludes appelate review of remand orders is to negate defendant's right to an Article III forum in a cause arising under the laws of the United States. The unreviewability of this ruling also renders the Supremacy Clause of the Constitution meaningless and violates due process rights and the First Amendment right of meaningful access to the courts because a single judge is vested with power to determine applicability of federal law. Remand is not a discretionary matter to be decided based upon unknown, unstated reasons but only upon the express reasons set forth in 1447(c). *AFL-CIO v. Seay*, 693 F.2d 1000 (10th Cir. 1982) *expl. on reh*, 696 F.2d 280 (10th Cir. 1983); *Otto v. State Board of Elections*, 661 F.2d 1130 (7th Cir. 1981).

II. 28 U.S.C. §1447(d) AS APPLIED DENIES NOPSI MEANINGFUL ACCESS TO THE FEDERAL COURT SYSTEM IN VIOLATION OF ITS FIRST AMENDMENT RIGHTS AND DENIES NOPSI ITS RIGHT TO DUE PROCESS PROTECTION OF ITS CONSTITUTIONAL RIGHTS AS PROVIDED FOR BY THE FIFTH AMENDMENT.[12]

As previously interpreted by this Court, review of a remand order is available under 28 U.S.C. §1447(c) and (d)

---

[12] The Fifth Amendment provides in pertinent part: "No person...shall be deprived of life, liberty or property, without due process of law;"

only when the remanding judge affirmatively states a non-1447(c) reason as grounds for the remand. Contrary to the normal standard of review, the court of appeals is barred from reviewing the merits of a remand order, "no matter how clearly erroneous the order appears on its face" unless a highly specialized set of circumstances is found to exist. *In Re Weaver,* 610 F.2d 335 (5th Cir. 1980); *Volvo Corporation of America v. Schwarzer,* 429 U.S. 1331, 50 L.Ed.2d 273 (1976).

An absolute right to appeal is not, in and of itself a constitutionally protected right. However, the First Amendment does give NOPSI a constitutionally protected right to meaningful access to the court system and in cases involving federal question jurisdiction, NOPSI maintains that Article III, Section 2 requires that access to a federal forum includes within its ambit the right of review by a court of appeals. The Fifth Amendment guarantees the protection of the due process of law in the exercise of those rights:

> "Congress shall make no law...respecting the right of the people...to petition the Government for a redress of grievances." This right includes the right of access to the courts. *See, e.g., California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 510, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972). Moreover, this right is subject to the due process protection of the Fifth Amendment; that is, the opportunity must be at a meaningful time and in a meaningful manner. *Boddie v. Connectivut,* 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971); *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965).

Matter of N.C. Trading, 586 F.2d 221, 231, N.28, (U.S. Court of Customs and Patent Appeals, 1978).

The standards for a decision of due process denial are well established:

> It is by now axiomatic that a determination that a due process liberty or property right has been violated does not determine the amount or type of process that is constitutionally required. As stated in *Morrisey v. Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972), "it has been said so often by this Court and others as to not require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands." More precisely, to identify the specific dictates of due process, three distinct factors must be considered: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail."

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 19 (1976); See also, *Old Dominion Dairy Products, Inc. v. Secretary of Defense,* 631 F.2d 953, 967 (U.S. App. D.C. 1980); *ECEE, Inc. v. Federal Energy Regulatory Com'n.,* 645 F.2d 339 (5th Cir. 1981).

Due process requires a careful review of all the facts of a given case. The very nature of due process precludes establishing inflexible procedure applying without variation to vastly varigated situations. *Smith v. Rabalias,* 659 F.2d 539, 543 (5th Cir. 1981), *cert. denied,* 455 U.S. 992 (1982).

Where a litigant's fundamental rights are involved, the court's review must be governed by a standard of "strict scrutiny." *National Ass'n. of Property Owners v. U.S.*, 499 F.Supp. 1223, 1247 (U.S.D.C., D. Minn. 1980), *affirmed*, 660 F.2d 1240, *cert. denied*, 455 U.S. 1007 (1982).

The essence of the issue NOPSI presents here was eloquently stated by Judge Slock long ago:

> Every court should desire that a reviewing court shall have an opportunity to pass on a doubtful question. It is contrary to the spirit of our Constitution and law and repugnant to the sense of fair play as indelibly instilled in the American people that a judge, who, after all, is a mere man, and subject to the same emotions, passions and prejudices as other men, should have the right or desire to decide important questions affecting substantial rights of litigants without giving the party feeling aggrieved the right of appeal to some other and higher tribunal, and this should not and will not be done, except in extreme cases, where the necessity is plainly apparent.
>
> * * * * *
>
> "Experience, observation, the thoughtful consideration of the subject through many generations of men by publicists and statesmen, have produced a consensus of opinion throughout the civilized world *that the final decision of grave issues should not be left to the court or judge who first hears or tries them*, however learned, able, wise, and impartial he may be, but that those disappointed in the first decision should be permitted to invoke the judgment of other unprejudiced minds upon the righteousness of the conclusion. The elaborate system of appellate courts maintained in this and other nations is a demonstration of the existence and the prevalence of this opinion.

"Every conscientious judge, every thoughtful man, upon whom is laid the grave responsibility and the heavy burden of determining the rights of his fellows, rejoices in the thought, wherever such is the case, that his decision may be reviewed, and that, if erroneous, it will not work irreparable injustice in him whom he deems it his duty to defeat. *When a case has been removed from a state to a federal court, and a motion to, remand it is made, or when a motion to remove it is presented in the first instance to the federal court, the petitioner either has or he has not the right to the trial and decision of his controversy in that court. That right is of sufficient value and gravity to be guaranteed by the Constitution and the acts of Congress. If it exists, and the Circuit Court denies its existence, and remands or refuses to remove the suit, the error is remediless, and it deprives the petitioner of his constitutional right.* If the right does not exist, and the court affirms its existence and retains the suit, the error may be corrected by the Supreme Court. An error that the aggrieved party may correct is less grievous than one that is without remedy. As the true rule is that motions to remand and for removal should be decided, not by the existence of doubts, but by the preponderance of the facts, the law, and the reasons which condition them, in view of the fact that *the right to invoke the jurisdiction of the federal court is a valuable constitutional right,* and an erroneous affirmance of the claim to that right may be corrected by the Supreme Court upon a certificate of the question of jurisdiction, while an erroneous denial of the claim is remediless." (Emphasis added)

Niccum v. Northern Assur. Co., 17 F.2d 160, 164-65 (DC, N.D. Ind. 1927), citing to *Boatman's Bank v. Fritzlen,* 135 F.650 (8th Cir. 1905).

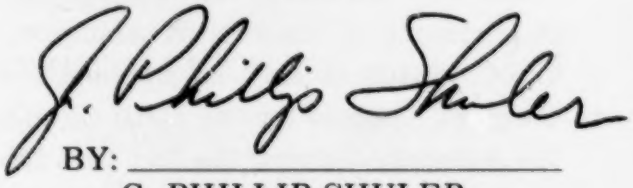
Following the guidelines set out in *Matthews, supra*, NOPSI maintains that, all factors considered, the dictates of due process have not been met by the current application of 28 U.S.C. §1447(d) to cases involving Federal Question jurisdiction. First, the private interests which are affected are constitutionally protected rights. In addition, the interest of the federal government itself in maintaining a uniform system of laws regarding labor policies and ERISA is at stake. The interests in need of protection then are fundamental to our concepts of justice and order. Second, the possibility of erroneous deprivation of these interests under 28 U.S.C. §1447(d) as applied is very high. While not implying that the incidence of erroneous decisions in this area by district court judges is inordinately high, the nature of the interest involved is of such consequence that a single error is a grievous matter. In addition 28 U.S.C. §1447(d) as applied precludes review even when a district court's decision is "clearly erroneous" on the face of the order, *In Re Weaver*, 610 F.2d 335, (5th Cir. 1980); such an application virtually *assures* an erroneous deprivation of rights. Allowing for review of a remand order under less stringent circumstances than are currently demanded would greatly decrease the possibility of an erroneous deprivation of the private and national interests in a federal forum. Finally, while broadening the scope for review under 28 U.S.C. §1447(d) would undeniably place a greater monetary and administrative burden on the federal court system, NOPSI asserts that the burden is not out of line with the nature of the interests protected and is properly aligned with the function of the appellate court system as authorized by the constitution.

CONCLUSION

Based upon the above and foregoing, this court

should grant the Petition herein and direct the Court of Appeals to require the district court to vacate its order of remand and reassume jurisdiction over this matter. Alternatively, the Court should declare 28 U.S.C. 1447(d) unconstitutional because it has been applied to deny the right of meaningful review of an erroneous remand order.

Respectfully submitted,
CHAFFE, McCALL, PHILLIPS
TOLER & SARPY



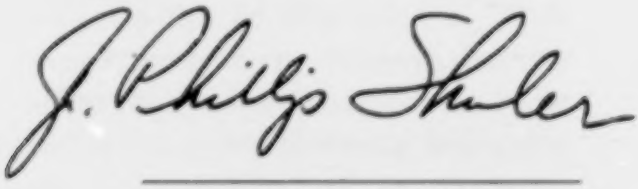
BY: _____

G. PHILLIP SHULER
1500 First N.B.C. Building
New Orleans, Louisiana 70112
Telephone (504) 568-1320
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Petition and Attachments have been duly mailed to counsel for Respondent, Mr. James E. Stovall, 944 International Trade Mart, New Orleans, Louisiana 70130; the Honorable Martin L. E. Feldman, United States District Judge, Eastern District of Louisiana, United States District Courthouse, 500 Camp Street, New Orleans, Louisiana and the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, as 28 U.S.C. §2403(a) may be applicable. The United States Court of Appeals for the Fifth Circuit has not certified to the Attorney General the fact that the constitutionality of 28 U.S.C. §1447(c)(d) has been drawn in question.

New Orleans, Louisiana, this ____ day of October, 1984.



G. PHILLIP SHULER

APPENDIX "A"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WYNNE, M.
APRIL 3, 1984
MINUTE ENTRY

CIVIL ACTION
NUMBER: 82-5815
SECTION: "F" (2)

WARREN MAJOUE, JR.

VERSUS

NEW ORLEANS PUBLIC SERVICE, INC.

A Preliminary Pre-Trial Conference was held this date.

PRESENT: (Telephone Conference)
James Stovall, Plaintiff
G. Phillip Shuler, Defendant

Pleadings have been completed. Jurisdiction and venue are established.

All pre-trial motions shall be filed and served in sufficient time to permit hearing thereon no later than 30 days prior to trial date.

Depositions for trial use shall be taken and all discovery shall be completed not later than 30 days prior to Pre-Trial Conference Date.

Amendments to pleadings, third-party actions, cross-claims and counter-claims shall be filed not later than APRIL 30, 1984

Counsel adding new parties subsequent to mailing of this Notice shall serve on each new party a copy of this Minute Entry.

Pleadings responsive thereto, when required, shall be filed within the applicable delays therefor.

Written reports of experts who may be witnesses for Plaintiff shall be obtained and delivered to counsel for Defendant as soon as possible, but in no event later than 90 days prior to Pre-Trial Conference Date.

Written reports of experts who may be witnesses for defendant shall be obtained and delivered to counsel for Plaintiff as soon as possible, but in no event later than 60 days prior to Pre-Trial Conference Date.

Counsel for the parties shall file in the record and serve upon their opponents a list of all witnesses and exhibits who may or will be called to testify on trial not later than 60 days prior to Pre-Trial Conference Date.

The Court will not permit any witness, expert or fact, to testify or exhibits to be used unless there has been compliance with this Order as it pertains to the witness.

Settlement possibilities were discussed. A further settlement conference will be scheduled before the Magistrate upon request of counsel.

This case does involve extensive documentary evidence.

A final pre-trial conference will be held before the District Judge on AUGUST 24, 1984 at 1:30 p.m. Counsel

will be prepared in accordance with the final Pre-Trial Notice attached.

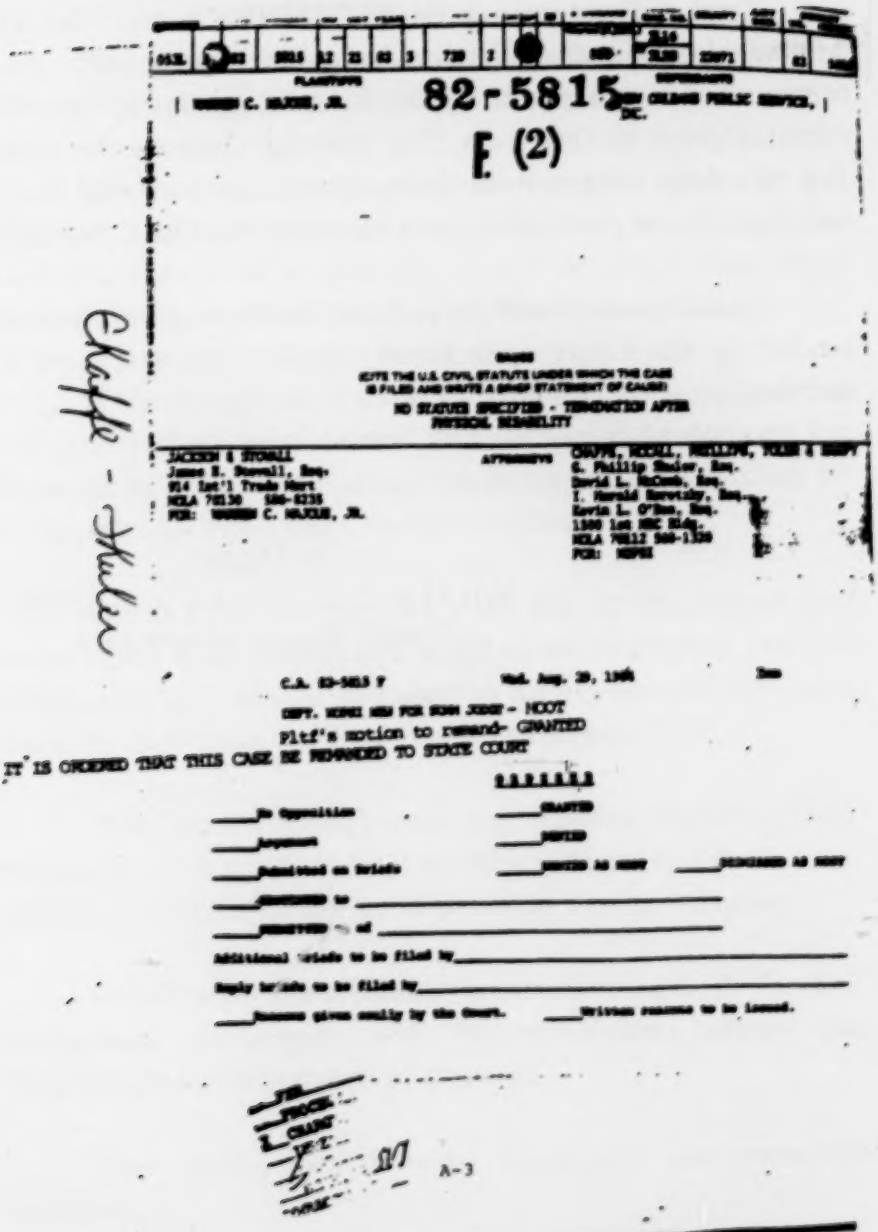
Trial will commence on SEPTEMBER 10, 1984 at 9:00 a.m. before the District Judge without a jury. Attorneys are instructed to report for trial not later than 30 minutes prior to this time. The starting time on the first day of a jury trial may be delayed or moved up one hour because of jury pooling. Trial is estimated to last 3 days(s).

Deadline or cut-off dates fixed herein may only be extended by the Court upon timely application and upon a showing of good cause.

/S/ Signed

MICHAELLE PITARD WYNNE
United States Magistrate

EXHIBIT 1



82-5815 SEC. F (2)

CAUSE
(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)
NO STATUTE SPECIFIED - TERMINATION AFTER PERSONAL DISABILITY

ATTORNEYS

JACKSON & STOVALL
James E. Stovall, Esq.
914 Int'l Trade Mart
NOLA 70130 586-8238
FOR: [redacted] C. MAXIE, JR.

CHAFFE, McCALL, PHILLIPS, TOLER & SARPY
G. Philip Shaler, Esq.
David L. McComb, Esq.
T. Harold Hornsby, Esq.
Kevin L. O'Dea, Esq.
1100 Lst NBC Bldg.
NOLA 70112 568-1320
FOR: NOPSI

C.A. 82-5815 F Wed. Aug. 25, 1982 Sec

DEFT. NOPSI MDN FOR REM JUDGE - MOOT
Plff's motion to remand- GRANTED
IT IS ORDERED THAT THIS CASE BE REMANDED TO STATE COURT

___No Opposition	___GRANTED
___Judgment	___DENIED
___Submitted on briefs	___DENIED AS MOOT ___DISMISSED AS MOOT
___CONTINUED to _____	
___RESETTED to _____	

Additional briefs to be filed by _____
Reply briefs to be filed by _____
___Reasons given orally by the Court. ___Written reasons to be issued.

JUL
DEPUTY CLERK

A-3

BEST AVAILABLE COPY

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-3655

IN RE:

NEW ORLEANS PUBLIC SERVICE, INC.,

Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Eastern District of Louisiana

---

Before WILLIAMS, JOLLY and HILL, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus is DENIED.

APPENDIX "C"

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 82-8080 DIVISION J DOCKET 4

WARREN C. MAJOUE, JR.

VERSUS

NEW ORLEANS PUBLIC SERVICE, INC.

FILED: 11/18/82 DEPUTY CLERK (Initialed)

PETITION

The petition of Warren C. Majoue, Jr., of legal age and domiciled in the Parish of Orleans, State of Louisiana, respectfully represents:

I.

That the defendant, New Orleans Public Service, Inc., a Louisiana Corporation doing business in this Parish and State, is justly and truly indebted unto your petitioner in the full and true sum of EIGHT HUNDRED THOUSAND AND NO/100 ($800,000.00) DOLLARS together with legal interest thereon from date of judicial demand until paid and for all costs of these proceedings for the following reasons:

II.

That in June of 1966 your petitioner became employed with defendant and worked on overhead lines.

III.

As incentive and motivation for this extremely hazardous employment was the custom and practice to keep employees on employment if they suffered a job related injury.

IV.

On April 23, 1975, while working on an overhead line, your petitioner was struck by 13,800 volts of electricity and after a few minutes when the voltage was released, he fell 31 feet to the ground.

V.

As a result of his electrocution and fall, petitioner was seriously and gravely burned internally and externally including both feet and his left wrist and arm together with other injuries all of which caused extensive hospitalization, surgical procedures, and medical treatment which still continues to date.

VI.

While initially hospitalized, petitioner was promised by defendant's officers and employees that he had nothing to worry about and that he would be taken care of and specifically promised that petitioner would be paid his full salary while he was disabled and all medical care would be paid.

VII.

Petitioner was further promised that he would be

retrained in electronics as an assistant engineer to enable him to check electric loads in new construction projects and would further maintain his full employment benefits and salary at least until petitioner was eligible for defendant sponsored disability retirement.

VIII.

Petitioner was given a Navy electronics book but, upon his return to work, he was sent back to field work until the skin grafts on the bottom of his feet failed.

IX.

Thereafter he was placed answering a telephone and not provided with the electronic training, and petitioner continued with his medical care.

X.

Then in April of 1982, four years short of his disability retirement eligibility, petitioner's employment was terminated by defendant without pay or compensation and his group benefits were terminated.

XI.

This termination was in breach of the parties' employment agreement and in breach of the original employment agreement customs and policies and further served to lull petitioner into a sense of security and well being for seven years thus depriving him of promised retraining prior to his termination just short of disability retirement eligibility.

XII.

As a result of defendant's breach, petitioner has suffered loss of income at his regular salary for four years, disability retirement benefits, regular retirement benefits, employment related health and life insurance benefits, and additional employment benefits, and severe emotional distress and anguish, all of which losses are estimated at EIGHT HUNDRED THOUSAND AND NO/100 ($800,000.00) DOLLARS.

XIII.

Petitioner avers amicable demand to no avail.

WHEREFORE, petitioner prays that the defendant be served with a copy of this petition and duly cited to appear and answer same and, after legal delays and due proceedings had, that there e judgment herein in favor of petitioner, Warren C. Majoue, Jr., and against the defendant, New Orleans Public Service Inc., in the full and true sum of EIGHT HUNDRED THOUSAND AND NO/100 ($800,000.00) DOLLARS with legal interest thereon from date of judicial demand until paid, and all costs of these proceedings.

JACKSON AND STOVALL

James E. Stovall
944 International Trade Mart
New Orleans, Louisiana 70130
586-8235

PLEASE SERVE:

New Orleans Public Service Inc.
through its registered agent
James M. Cain
317 Baronne Street
New Orleans, LA 70112

APPENDIX "D"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 82-5815
SECT. F MAG. 2

WARREN C. MAJOUE, JR.

VS.

NEW ORLEANS PUBLIC SERVICE, INC.

PETITION FOR REMOVAL

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA:

The petition of New Orleans Public Service, Inc. shows:

1.

On the 23rd day of November, 1982, an action was commenced against petitioner in the Civil District Court of the State of Louisiana in and for the Parish of Orleans entitled Warren C. Majoue, Jr., plaintiff, against New Orleans Public Service, Inc., defendant, No. 82-18080, Division "J", Docket No. 4, by the service upon petitioner of a citation and petition, copies of which are annexed hereto. By order dated December 6, 1982, the Civil District Court granted an additional thirty days on until January 7, 1982, within which to answer or otherwise plead. No further proceedings have been had therein.

2.

The above described action is one of which this Court has original jurisdiction under the provisions of Title 28 United States Code, §1332, Title 29 U.S.C., §185, and Title 29 U.S.C. §§1001, 1132 and 1140, is one which may be removed to this Court by the petitioner, defendant herein, pursuant to the provisions of Title 28 United States Code, §1441(b), in that it is a civil action founded on a claim or right arising under the Constitution and laws of the United States. As such, it is removable to Federal Court regardless of the amount in controversy or the citizenship of the parties thereto. The matter in controversy in this action exceeds the sum or value of $10,000 exclusive of interest and costs.

3.

Petitioner, defendant, New Orleans Public Service, Inc., herein, is an employer whose employees are in an industry affecting interstate commerce, and whose activities affect interstate commerce within the meaning of the National Labor Relations Act, 61 Stat. 136, 29 U.S.C., §151, *et seq.*.

4.

Plaintiff, a former employee of defendant, New Orleans Public Service, Inc., was employed by defendant, New Orleans Public Service, Inc., in a unit of employees represented for purposes of collective bargaining by a labor organization representing employees in an industry affecting commerce within the meaning of the National Labor Relations Act, 61 Stat. 136, 29 U.S.C., §151, *et seq.*

5.

While plaintiff was employed by defendant New Orleans Public Service, Inc., the terms and conditions of his employment were prescribed, governed, regulated, and protected by a collective bargaining contract between defendant, New Orleans Public Service, Inc., and a labor organization which was the plaintiff's representative for purposes of collective bargaining.

6.

Plaintiff's State Court petition alleges as a basis for action that, despite the aforementioned contract governing his tenure and terms and conditions of employment, he was improperly assigned and wrongfully discharged and deprived of pension and welfare benefits by defendant, New Orleans Public Service, Inc.

7.

This action is therefore a suit for violation of the contract between an employer and a labor organization representing employees in an industry affecting commerce, as defined in §301 of the Labor Management Relations Act, 29 U.S.C., §185, of which this Court would have jurisdiction under that section without regard to the amount in controversy. It is also an action of a civil nature founded on a claim of right arising, if at all, under the laws of the United States and may be removed to this Court under the provision of 28 U.S.C., §1441(b), without regard to the citizenship of the parties.

8.

Petitioner, defendant, New Orleans Public Service, Inc. is an employer that provides coverage for its employees under employee pension benefit and welfare benefit plans within the meaning of the Employee Retirement Income Security Act, 29 U.S.C. §1001, *et seq.*

9.

Plaintiff, a former employee of defendant, New Orleans Public Service, Inc., was a participant in an employee pension benefit and welfare benefit plan provided by defendant, New Orleans Public Service, Inc., within the meaning of the Employee Retirement Income Security Act, 29 U.S.C. §§1002, 1132.

10.

Plaintiff's State Court petition alleges as a basis for action that defendant, New Orleans Public Service, Inc. promised to retain him as an employee until eligible for retirement under the disaoility retirement plan and that defendant breached this alleged agreement by terminating plaintiff's employment "just short of disability retirement eligibility."

11.

This action is therefore a suit by a participant of an employee pension benefit plan and welfare benefit plan to recover benefits allegedly due to him under the terms of such benefit plans within the meaning of the Employee Retirement Income and Security Act, 29 U.S.C. §1132, and/or, in the alternative, is a suit by a benefit plan

participant alleging that the termination of his employment was for the purpose of interfering with the attainment of a right under employee pension benefit and welfare benefit plans within the meaning of the Employee Retirement Income Security Act 29 U.S.C. §1140 of which this Court would have jurisdiction under that section without regard to the amount in controversy.

12.

This petition is filed within 30 days after defendant received copies of the citation and petition, and it is accompanied by a bond with good and sufficient surety conditioned as required by 28 U.S.C. §1446(b).

13.

Upon the filing of this petition and bond, defendant, petitioner herein, has at the same time given written notice to plaintiff in the State Court action, through his counsel, by furnishing him copies of this petition and attachements, and further, will file forthwith a copy of this petition and attachments with the Clerk of the Civil District Court for the Parish of Orleans, State of Louisiana.

WHEREFORE, defendant, petitioner herein, prays that this cause be removed to the United States District Court for the Eastern District of Louisiana, and that this Honorable Court take and assume full and complete jurisdiction, and that it be granted such other and further relief as the Court may deem just and proper.

Respectfully Submitted,

CHAFFE, McCALL, PHILLIPS,
TOLER AND SARPY

BY: (Signed)

G. Phillip Shuler
David L. McComb
I. Harold Koretzky
Kevin L. O'Dea
Attorneys for New Orleans Public
Service, Inc.
1500 First N.B.C. Building
New Orleans, LA 70112
Telephone: 568-1320

SWORN TO AND SUBSCRIBED
before me, this 21st day
of December, 1982.

NOTARY PUBLIC

APPENDIX "E"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 82-5815
SECTION "F"
MAG. DIVISION 2

WARREN C. MAJOUE, JR.

VERSUS

NEW ORLEANS PUBLIC SERVICE INC.

ANSWER

COMES NOW defendant New Orleans Public Service Inc. (hereinafter called defendant or NOPSI) and for answer to the Complaint alleges and avers as follows:

1.

In answer to Paragraph I of the Complaint, NOPSI admits that it is a Louisiana corporation doing business in the Parish of Orleans and denies the remaining allegations therein.

2.

The allegations of Paragraph II of the Complaint are admitted.

3.

The allegations of Paragraph III of the Complaint are denied.

4.

In answer to paragraph numbered IV of the Complaint, defendant admits that on April 23, 1975 plaintiff came in contact with 13,000 volts of electricity while working on an overhead line and denies the remaining allegations therein.

5.

In answer to paragraph numbered V of the Complaint, defendant admits that plaintiff incurred burns upon his feet and left hand for which he was hospitalized and received medical treatment but denies the remaining allegations therein.

6.

The allegations of paragraph numbered VI of the Complaint are denied.

7.

The allegations of paragraph numbered VII of the Complaint are denied.

8.

The allegations of paragraph numbered VIII of the Complaint are denied.

9.

In answer to paragraph numbered IX of the Complaint, defendant admits that upon plaintiff's return to

work he continued to receive medical care but denies the remaining allegations contained therein.

10.

In answer to paragraph numbered X of the Complaint, defendant admits that plaintiff's employment was terminated in April of 1982 but denies the remaining allegations contained therein.

11.

The allegations of paragraph numbered XI of the Complaint are denied.

12.

The allegations of paragraph numbered XII of the Complaint are denied.

13.

The allegations of paragraph numbered XIII of the Complaint are admitted.

14.

The remaining allegations of the Complaint consist entirely of prayers for relief not requiring answer but insofar as they, or any of them, may be construed to contain allegations of fact the same are denied.

AND NOW FURTHER ANSWERING THE COMPLAINT, defendant alleges and avers the following affirmative defenses:

FIRST DEFENSE

15.

The Complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

16.

Plaintiff's claims are barred by his failure to exhaust the grievance and binding arbitration provisions established as the sole method of adjusting disputes arising under the collective bargaining agreement between the labor organization which represented him and the defendant.

THIRD DEFENSE

17.

Plaintiff's claims for retirement, health and life insurance benefits are barred by his failure to exhaust the grievance and arbitration provisions established as the sole method of adjusting disputes arising under the employee pension benefit and health and welfare benefit plans maintained by defendant.

FOURTH DEFENSE

18.

Plaintiff's claims for retirement, health and life insurance benefits under state law are pre-empted by the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq.

FIFTH DEFENSE

19.

Plaintiff's claims grounded upon an alleged individual contract of employment are pre-empted by the federal labor law policy established under the National Labor Relations Act, 29 U.S.C. § 151 et seq.

SIXTH DEFENSE

20.

Any alleged individual employment contract entered into between plaintiff and defendant was for an indefinite period of time and was therefore terminable at will with or without cause.

SEVENTH DEFENSE

21.

Plaintiff was terminated for cause.

EIGHTH DEFENSE

22.

Alternatively, and only in the event that plaintiff may maintain any state law claims, plaintiff may not recover emotional distress or anguish damages for breach of contract under La. Civ. Code Art. 1934.

NINTH DEFENSE

23.

Accord and satisfaction.

WHEREFORE, defendant New Orleans Public

Service Inc. prays that judgment be entered, that plaintiff take nothing by his suit, that his suit be dismissed, that defendant recover all costs including attorney's fees and that defendant have such other and further relief, both general, special, legal and equitable, to which it shows itself justly entitled.

Respectfully Submitted,

CHAFFE, McCALL, PHILLIPS,
TOLER AND SARPY

BY: (Signed)
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been forwarded to all attorneys of record in an envelope, properly addressed with postage prepaid in the U.S. mail on this 7th day of January, 1983.

/S/ Signed
KEVIN L. O'DEA

APPENDIX "F"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 82-5815
SECTION "F" (2)

WARREN C. MAJOUE, JR.

VERSUS

NEW ORLEANS PUBLIC SERVICE, INC.

SUPPLEMENTAL AND
AMENDING COMPLAINT

COUNT 2

XIV.

In the alternative, and only in the event that this court determines that it has concurrent or original jurisdiction over any or all claims relating to claimant's pension benefits under the Employee Retirement Income Security Act, 29 U.S.C. 1001, et seq., and only in that event, then claimant avers in the alternative as follows:

XV.

That defendant, New Orleans Public Service, Inc.'s Disability Retirement Plan does not provide adequate and understandable written notice requirements pertaining to claim denials and does not provide for a full and fair review by some named authority.

XVI.

That further, in this instance, NOPSI did not comply with its own notice of appellate procedure nor provided any meaningful private redress.

XVII.

Accordingly, claimant complied with all administrative procedures of the disability plan and any further efforts would have been fertile.

COUNT 3

XVIII.

Further in the alternative, defendant as a fiduciary under ERISA and as the same party who promised claimant he would remain on the payroll while disabled until such time as he reached disability retirement breached that fiduciary duty by terminating claimant and deprived him of attaining that right, and breached its own implementation of the plan.

XIX.

Defendant is liable for compensatory damages including loss of disability pension benefits, emotional distress, and loss of wages.

COUNT 4

XX.

Claimant further avers that defendant, NOPSI, as a

fiduciary terminated petitioner with wanton indifference as to claimant's rights under the disability plan and in order to serve as a deterent to further such actions, claimant demands punitive damages in the amount of ONE MILLION AND NO/100 ($1,000,000.00) DOLLARS.

XXI.

Claimant further prays for general equitable and remedial relief.

WHEREFORE, claimant prays that his original petition be supplemented and amended in the foregoing particulars and prays for judgment in his favor against the defendant.

JACKSON AND STOVALL

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New Orleans, Louisiana 70130
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APPENDIX "G"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 82-5815
SECTION "F" (2)

WARREN C. MAJOUE, JR.

VERSUS

NEW ORLEANS PUBLIC SERVICE INC.

MOTION TO REMAND

Plaintiff in the above case removed to this Court by the defendant, moves to remand the above matter to the Civil District Court for the Parish of Orleans, State of Louisiana, the court in which this matter was pending at the time of such removal, upon the following grounds:

1.

Plaintiff denies the allegations of the Petition for Removal that this Court has original jurisdiction of this case; and further denies that this action is a suit under the National Labor Relations Act, 29 U.S.C. § 151 et seq., nor under the Employee Retirement Income Security Act, 29 U.S.C. 1001 et seq.

2.

Plaintiff avers that this is an action arising under the laws of the State of Louisiana.

3.

This Court does not have jurisdiction over the matter alleged by defendant relative to the National Labor Relations Act.

4.

This Court does not have exclusive jurisdiction over the cause of action relating to retirement benefits since those benefits are too remote from the principal cause of action and constitute a peripheral element of damages, and accordingly this Court should not assume jurisdiction.

5.

The cause herein was improperly removed in that it is properly within the jurisdiction of the Civil District Court for the Parish of Orleans, State of Louisiana.

6.

The cause herein was improperly removed in that the matters asserted in the Complaint filed in the Civil District Court for the Parish of Orleans, State of Louisiana, did not represent a claim or right arising under the Constitution, Treaties or laws of the United States.

7.

Respondent herein further moves the Court to order the payment to the plaintiff by the defendant of all costs and disbursements incurred by reason of the removal proceedings.

WHEREFORE, the plaintiff prays that this case be removed to the Civil District Court for the Parish of Orleans, State of Louisiana, in accordance with the requirements of 28 U.S.C. 1447(c).

JACKSON AND STOVALL

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